STATEMENT OF GALE NORTON
ATTORNEY GENERAL OF COLORADO
ON S.B. 1771, COLORADO UTE SETTLEMENT ACT AMENDMENTS OF 1998
JOINT HEARING
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS AND THE ENERGY AND NATURAL RESOURCES SUBCOMMITTEE ON WATER AND POWER
UNITED STATES SENATE

June 24, 1998

S.B. 1771 implements an agreement among the Southern Ute and Ute Mountain Ute Tribes, the Navajo Nation, an water users in Colorado and New Mexico to build a modified Animas-La Plata Project that will satisfy the Ute Tribe reserved water rights claims for about one-third the cost to federal taxpayers of the original project. This legislatio responds to previous fiscal and environmental criticisms of the original project; provides for state and local cost-sharing; and recognizes that the responsible federal agencies have fully complied with the Endangered Species Ac the National Environmental Policy Act, and the Clean Water Act. Most importantly, however, S.B. 1771 is acceptab to the Ute Tribes as a final settlement of their legal claims to water from the Animas and La Plata Rivers. If S.B. 17 is not enacted, the State of Colorado, the United States, the Ute Tribes, and southwest Colorado water users appe destined for years of expensive and acrimonious litigation.

The Animas-La Plata Project's primary purpose is to settle litigation by the United States asserting reserved water rights on behalf of the Southern Ute and Ute Mountain Ute Tribes. Over a decade ago, both the United States an the State of Colorado made a solemn commitment to the Tribes to build the project so that the Tribes would have water to meet their needs. The Tribes have rejected all proposals to give them money instead of water, and decad of studies have shown that this project is the only feasible way to provide that water. S.B. 1771 allocates to the Ute Tribes almost two-thirds of the depletions presently allowed by the U.S. Fish and Wildlife Service's biological opinio for the project, issued under section 7 of the Endangered Species Act.

It is important to understand the history of the federal and State of Colorado commitments to build Animas-La Plat In Winters v. United States, 207 U.S. 564 (1908), the U.S. Supreme Court held that when the United States enters in a treaty with an Indian tribe creating a reservation, it impliedly reserves sufficient water to irrigate the reservation lands. These reserved water rights have a priority date based on the date of the creation of the reservation, which makes them senior to non-Indian water rights appropriated after the reservation was created. Based on the Winte doctrine, in 1976, the United States Department of Justice filed reserved water right claims in Colorado water cou on behalf of the Ute Tribes. The original Ute Reservation was established by treaty in 1868 (with some later additions), making the claimed rights the most senior rights on the river.[2] Thus, if successful, the Tribal claims wou have preempted the vested water rights of non-Indian water users. In the more water-short river basins, such as th La Plata River basin, the claims had the potential to exceed the entire available water supply, thereby drying up fam farms and ranches that have existed for generations and wreaking havoc on local economies.

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[1] The Department of Justice originally filed the claims in federal district court in 1972. The United States Supreme Court ruled that, under the McCarran Amendment, 43 U.S.C. § 666, the case should be heard in state court. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

[2] The United States actually claimed a priority date of time immemorial for the original reservation, but an 1868 priority would have the same practical effect.

As the parties began preparing for trial, it became clear that there were many contested issues, including the priori dates of the claimed rights, the amounts of water to which the Tribes were entitled,[3] the purposes for which the wat could be used, whether the water could be used off the reservations, and how and by whom the rights would be administered. Rather than pursuing lengthy, costly, and hostile litigation, all the parties sat down together and, aft years of negotiation, entered into the Colorado Ute Indian Water Rights Final Settlement Agreement in 1986. Tw years later, Congress passed the Colorado Ute Indian Water Rights Settlement Act of 1988, Public Law 100-585, ar President Reagan signed it, affirming the federal commitment to build Animas-La Plata. In 1991, the Colorado wat court entered consent decrees based on the Settlement Agreement and passage of the Settlement Act and necessary state legislation. However, compliance with environmental statutes and questions about the project's cost delayed construction. Thus, ten years after passage of the Settlement Act, the United States still has not kept its promise to build this project.

In an effort to break the stalemate, project proponents entered into discussions with project opponents under the auspices of Colorado's governor and lieutenant governor. After meeting many times and consulting with federal agencies, each side put forward a proposal. The opponents' proposal relied primarily on the payment of money, which was not acceptable to the Ute Tribes. The proponents, however, negotiated among themselves, with the Trib and water users all making major concessions, to arrive at the proposal for a smaller, less expensive project that forn the basis for S.B. 1771. The project beneficiaries decided to limit the project to the 57,100 acre-feet of depletions th an FWS biological opinion determined would not harm endangered fish species in the river they allocated most of the project water to the Ute Tribes, with other water users in Colorado and New Mexico, including the Navajo Natio receiving a smaller share. §3(a). Irrigated agriculture took the biggest hit; about 48,000 acre-feet are allocated to Indian and non-Indian municipal and industrial uses, §3(a), while the Secretary is authorized to allocate an additional 6,010 acre-feet for irrigation, §3(b). The Act does not include any facilities to deliver water to the La Pla basin, but non-Indian farmers and ranchers in that basin benefit from S.B. 1771 because it protects their existing water rights by finally removing the threat that has hung over their heads all these years. §3(c).
Some project opponents question the Ute Tribes' decision to insist that the United States live up to its part of the bargain and build a real reservoir that holds real water rather than giving them money to buy water rights. These groups presume to tell the Tribes that they are making a bad deal because the modified project does not include wat delivery facilities. Certainly the Tribes would prefer to have delivery facilities included in the project, as they shou be under the Settlement Agreement and 1988 Act, but they elected to sacrifice those facilities in order to secure wat in storage that they can use on or off the reservations, consistent with the water marketing provisions of the Settleme Agreement and the 1988 Act, which remain unchanged. Project opponents fail to respect the Tribes' long strugg to secure water for their future. Instead, they seek to penalize the Tribes for compromising, and to force them to ta money in place of the water to which they are entitled.

Project opponents also argue that S.B. 1771 exempts the Animas-La Plata Project from environmental complianc That is absolutely not true. Rather, the Act recognizes that there has already been full compliance with the Endangered Species Act, the National Environmental Policy Act, and the Clean Water Act. §3(c). Animas-La Pla may well be the most thoroughly studied, modified, and mitigated water project in history. In fact, the high pumpi costs about which its opponents complain are the result of the original, environmentally sensitive siting decision to build the reservoir off-channel, rather than in the Animas Gorge. Federal agencies and environmental groups wh will be satisfied with nothing less than complete abandonment of the project s study the project to death. S.B. 1771 simply says "enough is enough."

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[3] Indian reserved rights are generally quantified on the basis of "practicably irrigable acreage." *Arizona v. California*, 373 U.S. 546, 598-601 (1963). This number was very much in dispute.

Construction of the Animas-La Plata Project, as modified, remains essential to the settlement. Under the Settleme Agreement, if key portions of the
2005 to elect whether to go back to water court to pursue their original claims in the Animas and La Plata Rivers. If construction is well under way by then, I am confident that the Tribes will not pursue that option. However, unle Congress takes prompt and decisive action to end what has become an administrative nightmare and meet the feder government's commitment to the Tribes, I fear they will look to the courts for relief.

Reopening of the Ute Tribes' claims would trigger litigation among the Tribes, the United States, the State of Colorado, and water right holders, as well as renewed uncertainty regarding t
As discussed above, the Tribes' reserved rights claims raise a number of complex legal and factual issues and threate the livelihoods of farmers and ranchers who rely on the already water-short La Plata River. Such litigation would involve virtually all water users in the Animas and La Plata basins, take many years of trial and appeals, cost millio of federal state, and local taxpayer dollars, and undo decades of cooperation between Indians and non-Indians in southwest Colorado.

I do not exaggerate. The Bi
Wind River Indian Reservation, began in 1977 and was decided by the Wyoming Supreme Court for the first time i 1988. In re General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988 The case then went to the U.S. Supreme Court. Wyoming v. United States, 492 U.S. 406 (1989). Since then, the ca has been to the Wyoming Supreme Court four more times. In re General Adjudication of All Rights to Use Water i the Big Horn River System, 803 P.2d 61 (Wyo. 1990); 835 P.2d 273 (Wyo. 1992); Docket Nos. 93-48 & 93-49 (Oct. 26, 1993) (unreported order dismissing appeal); 899 P.2d 848 (Wyo. 1995). Nor have the issues been finally resolve There is presently a proceeding underway to resolve disputes over quantification of private rights derived from trib lands. All told, the State of Wyoming and the United States have spent tens of millions of dollars litigating the Wi River Reservation claims for more than twenty years, and the result is continuing conflict.

While I obviously cannot discuss the State of Colorado's possible defenses to the United States' claims, or the like outcome of the litigation, one thing is certain: there will be a big loser, whether it is the Tribes or the water users, ar ultimately, the entire region will suffer. S.B 1771 is the right thing to do. The Act meets the United States' trust obligations to the Ute Tribes and protects the existing property rights of all water users in the Animas and La Pla basins in Colorado in a way that is fiscally and environmentally responsible. I fully support this settlement and ur you to do likewise.